No. 96-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*,

Petitioners,

—v.—

GEORGE WINDSOR, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, ARKANSAS, DELAWARE, HAWAII, IDAHO, KANSAS, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA AND VIRGINIA AND THE DISTRICT OF COLUMBIA AND THE TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

DANIEL E. LUNGREN
Attorney General
State of California

THOMAS F. GEDE
Special Assistant Attorney General

ALBERT NORMAN SHELDEN
Supervising Deputy Attorney General
110 West A Street, #1100
P.O. Box 85266
San Diego, California 92186-5266
(619) 645-2062

DENNIS C. VACCO
Attorney General
State of New York

BARBARA GOTT BILLET
Solicitor General

SHIRLEY F. SARNA
NANCY SPIEGEL
JOY FEIGENBAUM*
JANE M. KIMMEL
Assistant Attorneys General
120 Broadway
New York, New York 10271
(212) 416-8844

**Counsel of Record*

(Additional counsel listed on inside cover)

WINSTON BRYANT
Attorney General
State of Arkansas

M. JANE BRODY
Attorney General
State of Delaware

JO ANN M. UCHIDA
Executive Director
Office of Consumer Protection
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

CARLA J . STOVALL
Attorney General
State of Kansas

ALBERT B. CHANDLER III
Attorney General
State of Kentucky

FRANK J. KELLEY
Attorney General
State of Michigan

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

JOSEPH P. MAZUREK
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

MICHAEL F. EASLEY
Attorney General
State of North Carolina

HEIDI HEITKAMP
Attorney General
State of North Dakota

W. A. DREW EDMONDSON
Attorney General
State of Oklahoma

JAMES S. GILMORE III
Attorney General
State of Virginia

CHARLES P.C. RUFF
Corporation Counsel
District of Columbia

CALVIN E. HOLLOWAY SR.
Attorney General
Territory of Guam

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INTEREST OF AMICI CURIAE STATES

The States of New York, California, Arkansas, Delaware, Hawaii,[1] Idaho, Kansas, Kentucky, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Virginia and the District of Columbia and the Territory of Guam, as amici curiae, respectfully submit this brief pursuant to Supreme Court Rule 37. The matter before the Court concerns a federal district court's certification and the Third Circuit's subsequent decertification of a "settlement class" (*i.e.*, a class sought to be certified for the sole purpose of settlement) in a federal multidistrict class action lawsuit involving claims of occupational exposure to asbestos. The specific issue before the Court is whether and in what circumstances a settlement class that admittedly could not be certified under Rule 23 of the Federal Rules of Civil Procedure for purpose of trial, may nevertheless be certified under that rule by a federal district court for the purpose of settlement.

The case before this Court implicates critical due process and fairness concerns. For this reason, the interests of the amici States are many and of great moment. Indeed, the amici States believe we have a unique perspective which should be heard because vast numbers of our citizens are members of the *Georgine* class. The class includes occupationally exposed people who are presently suffering from asbestos-related illnesses, as well as people who were exposed but are not yet sick (the "futures" or "future claimants"). These citizens are largely unaware that they have been made members of the broadly defined class in this case, or that their rights to file lawsuits to recover damages for asbestos-related illnesses (the

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[1] Of the states participating, all except Hawaii are represented by the Attorneys General of the respective states. Hawaii is represented by its Office of Consumer Protection, an agency which is not a part of the state Attorney General's office, but is statutorily authorized to undertake consumer protection functions, including legal representation of the state. For the sake of simplicity, we will refer to the whole group, including the District of Columbia and the Territory of Guam, as the "Attorneys General" or the "amici States".

symptoms of which may not have yet manifested themselves) could be irretrievably lost.

The rights of our citizens would be seriously compromised if the Court were to pronounce a rule recognizing the validity of settlement classes without stringent review and safeguards. Therefore, we as State Attorneys General, charged with responsibility for protecting the public interest, urge the Court to take heed of the critical constitutional concerns raised. We seek to ensure that the constitutional requirements of due process—including that adequate notice and adequate representation are fully and meaningfully implemented for all class members, and that class members have the right to opt out of a class action lawsuit or settlement at a time that is meaningful to them—are not forgotten.

At the outset, we wish to emphasize our belief that class action lawsuits (and settlements of those lawsuits) are important devices for citizens to vindicate legal rights that may have been infringed on a broad scale. We recognize as well that innovation may ultimately be necessary to solve the tangled legal, medical and social problems presented by mass tort litigation, particularly in areas involving latent diseases caused by contact with or exposure to harmful products. Nevertheless, because vital personal interests of our citizens are implicated, particularly in the mass tort context where individuals may have their rights to file lawsuits seeking very substantial sums in compensatory and punitive damages taken from them without their knowlege, courts must ensure that innovation does not override the requirements of constitutional due process and fundamental fairness. As observed by Judge Smith in his dissenting opinion in *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996):

> In exchange for losing the right to prosecute his own action, a class member must receive a variety of substitute protections. . . .[T]he safeguards required by due process necessarily differ according to the type of action, and when confronted with a new animal, we must analyze those safeguards anew. Reliance on strained analogies to inapposite traditional actions leaves us in what one commentator has aptly labeled a "due process quandary," Thus the irony: The majority eviscerates well-established due process protections because of the "unique facts" of the case. . . , but fails to recognize that those novel facts may actually call for *enhanced*, not lessened, protections for vulnerable asbestos victims. [citations omitted]

Id. at 999. Amici ask this Court to define and require due process protections for mass toxic tort victims who, knowingly or not, are made class members in settlement class actions.

SUMMARY OF ARGUMENT

The case before this Court is a settlement class action of the most far-reaching proportions[2], in which the majority of the class members are "future claimants." Those class members are not yet ill, and, for the most part, are completely unaware that their rights to file lawsuits for damages for life threatening illnesses[3] they may later develop will be forever lost, because they are unaware of their right to opt out of the class. While the goals of efficiency and of bringing closure to complicated mass tort litigation are laudable, important due process rights of the victims must not be sacrificed along the

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[2] The class is defined as all people who did not file suit against the CCR defendants by January 15, 1993 and were occupationally exposed to defendants' asbestos products or who were exposed to asbestos from those products through the occupational exposure of a family member. *Georgine v. Amchem Prods., Inc.*, 83 F.3d at 619 (3d Cir. 1996) ("*Georgine*").

[3] For example, future claimants who may be unaware of their exposure to asbestos may someday develop mesothelioma, the only known cause of which is exposure to asbestos. Individuals suffering from mesothelioma usually die within two years of onset of the illness. *Id.* at 626.

way.[4] The settlement class action before the court is constitutionally deficient in this very respect. The inherent dangers of settlement class actions, particularly those which cannot be certified under Rule 23 for the purpose of trial, require heightened judicial scrutiny to ensure that the due process requirements of adequate notice, adequate representation and the right to opt out are not sacrificed in the desire to bring closure to mass tort litigation.

The amici States propose that the Court adopt objective standards by which to judge mass tort settlement class actions. First, for notice to be adequate, a district court should be required to find that the notice is comprehensible to a lay reader of ordinary intelligence and contains all those disclosures (including the costs as well as the benefits of settlement, along with information on what similarly situated plaintiffs have obtained as compensation in the tort system) that a class member would need to make an informed judgment as to whether to opt out of or object to the settlement, or retain counsel. Second, for representation to be found adequate, class counsel should not be permitted simultaneously to represent class members with competing interests. Whenever the class contains such claimants, they should be separately represented in distinct subclasses, and in cases involving future claimants, the court should consider the appointment of a special advocate to the class. The district court should further be required to consider the following factors as indicia of the inadequacy of representation: (a) parallel

[4] While Petitioners recognize that the "touchstones" for interpreting the Federal Rules are "efficiency and fairness" (Br. for Petitioners at 33), they devote the majority of their 49 page brief to a discussion of the principles of judicial efficiency served by Rule 23 settlement class actions, save for approximately four pages of discussion on the issue of fairness. It is precisely this unequal weighting of efficiency over fairness that concerns the amici States and requires that this Court impose a standard of heightened scrutiny and provide objective standards against which courts must measure the constitutional sufficiency of settlement class actions.

representation, by class counsel, of both the class and of similarly situated non-class claimants, (b) negotiation of settlement agreements for class counsel's non-class clients in conjunction with the negotiation of a class settlement, (c) settlement terms negotiated for the non-class clients that are more favorable than the terms negotiated for the class; (d) selection of class counsel by defendants to negotiate a global settlement of all claims; and (e) definition of the class to include only those claimants who have not filed lawsuits against the defendants by a given date. Finally, when the settlement class action involves substantial numbers of future claimants, a district court should be required to find that class members are afforded an opportunity to opt out of the settlement at a point in time that is meaningful to them, *e.g.*, in this matter, at the time a future claimant develops asbestos-related illness.

ARGUMENT

I

SETTLEMENT CLASS ACTIONS THAT CANNOT BE CERTIFIED UNDER RULE 23 FOR THE PURPOSE OF TRIAL SHOULD BE GIVEN HEIGHTENED JUDICIAL SCRUTINY

The amici States believe that where settlement class actions are used to solve the problems of mass tort cases, the courts, through constitutionally required heightened oversight, must see that minimum due process protections are not only afforded in theory, but are meaningfully implemented as safeguards against the inherent dangers of this class action device.

Various courts and commentators have expressed concerns that settlement classes[5] which could never be certified for

[5] A "settlement class" is a class sought to be certified for the sole purpose of settlement. MANUAL FOR COMPLEX LITIGATION § 30.45 (3d ed. 1995). *Georgine* was filed as a "settlement class action" *i.e.*, the class action complaint and stipulation of settlement were filed simul-

purposes of litigation, raise serious agency problems that undermine the accountability of class counsel and create a substantial risk of collusion between class counsel and defendants. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768,786-94 (3d Cir.), *cert. denied*, 116 S.Ct. 88 (1995); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 152 (S.D. Ohio 1992); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837 (1995); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7 (1991) [hereinafter Macey & Miller]; James A. Henderson, Jr., *Comment: Settlement Class Actions and The Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1021 (1995). Critics argue that settlement class actions effectively enable defendants to conduct a "reverse auction,"[6] allowing defendants to seek out the

taneously. All parties admit that the class could never be certified under Fed.R.Civ.P. 23 for purpose of trial because of its breadth and the enormously different factual and legal issues that would need to be tried. The Third Circuit in *Georgine* thus noted that "this case is so much larger and more complex than all other class actions on record that it cannot conceivably satisfy Rule 23." *Georgine v. Amchem Prods., Inc.*, 83 F.3d at 618.

Petitioners argue that the Third Circuit's opinion conflicts with long-standing case law allowing settlement classes. (Br. for Petitioners at 22-25). However, the cases Petitioners rely on do not authorize the settlement of cases that all concede could not possibly be certified for trial. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) defined "settlement classes", not as class actions that could not possibly be tried, but as class actions in which the class was certified after the settlement, with notice of the action and settlement issued simultaneously. *In re Beef Industry Anti-Trust Ligtigation*, 607 F.2d 167, 177 (5th Cir. 1979) used the term "tentative settlement class", which was defined as "nothing more than a tentative assumption indulged in by the court to facilitate the amicable resolution of the litigation, rather than as some sort of conditional class ruling under Rule 23 criterion".

[6] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354 (1995) [hereinafter Coffee, *Class Wars*] and note 35, *infra*, for a discussion of the "reverse auction."

plaintiffs' attorneys most willing to accept the lowest settlement for the class in return for a substantial award of fees.[7]

As discussed in a letter from a steering committee of 144 law professors to the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference, (*see* letter dated May 18, 1996 and addendum [hereinafter *Steering Committee Letter*]) there is a great risk in authorizing class actions that can be settled, although not tried, where the only lawyers who may serve as class counsel are those who have struck a deal with the defendant to settle not only the class' claims, but also class counsel's whole inventory of non-class claims.[8] The steering committee argues that such a regime enables defendants to select class counsel and to shop for the lawyer who asks the least on behalf of the class.

Moreover, the collusion invited by class action settlements is not limited to collusion engaged in by a few consciously corrupt lawyers. Even well-intentioned lawyers may be hard pressed to walk away from settlements which are not in the

[7] *See Mars Steel Corp. v. Continental Ill Nat'l Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987) (wherein court acknowledged that "a lawyer may be able to obtain a large fee not just by outbidding another class lawyer but, alternatively, by 'selling out' the class"); *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982) (noting, in context of class settlement negotiated prior to filing suit, that "the interest of the lawyer and the class may diverge" and that "certain interests may be wrongfully compromised, betrayed or 'sold-out' without drawing the attention of the court." [citations omitted]); *In re Asbestos Litig.*, 90 F.3d at 993-95 (Smith, J., dissenting); Roger C. Cramton, *Individualized Justice, Mass Torts, And "Settlement Class Actions"; An Introduction*, 80 CORNELL L. REV. 811, 826 (1995) [hereinafter Cramton]; John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222,1224 (1995); Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 515 (1996).

[8] John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. at 851, 853-54 (1995) [hereinafter Coffee, *Corruption of the Class Action*] (discussing that plaintiffs' attorneys chosen as class counsel have the "linked ability to settle on a superior basis" their entire existing inventory of cases.)

best interests of the class when they know that some other lawyer would be more than willing to accept the same or perhaps a worse settlement.[9]

Settlement class actions also change the dynamics between the plaintiffs' lawyers and defendants. Plaintiffs' lawyers in such cases are in a substantially weakened bargaining position because they do not have the leverage that comes from the ability to force a defendant to trial.[10]

Finally, the availability of information in such settlement class actions is substantially reduced, greatly limiting the class members' and the court's ability to assess the fairness of the settlement or the adequacy of the representation afforded by class counsel. *See* MANUAL FOR COMPLEX LITIGATION § 30.45. A court's ability independently to assess the fairness of the settlement in the fairness hearing is severely restricted in such cases because the court is dependent on the information provided jointly by the defendant and class counsel.[11] Moreover, such hearings are not typically adversary proceedings; objectors are rare and they, too, have limited information. *See supra* note 11. Finally, because certification may be requested before any significant discovery has been conducted, much less information is available at the certification

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9 Steering Commitee Letter at 5; Cramton, *supra* note 7, at 826 (recognizing that "incentives involved may overwhelm the judgment of otherwise highly ethical lawyers."); Arthur Bryant, *An Open Invitation to Class Action Abuse*, Litigation News, Nov. 1996, Vol 22, No.1, pp. 4,11.

10 *In re General Motors*, 55 F.3d at 788 (noting that settlement class actions create possibility that plaintiffs' attorneys will be negotiating from a "postion of weakness"); Coffee, *Class Wars*, *supra* note 6, at 1453 (noting that plaintiffs' attorneys are "effectively negotiating with one arm tied behind their back.")

11 *In re General Motors*, 55 F.3d at 787; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1126-1128 (1995) [hereinafter Koniak, *Feasting*].

hearing than in a litigated class action.[12] The potential for collusion, changed dynamics, and diminished information available in settlement class actions demand a standard of heightened scrutiny to ensure that class members are afforded the constitutionally required safeguards of adequate notice, adequate representation and opportunity to opt out. The need for heightened scrutiny is even more compelling where large numbers of future claimants are class members.

Considerable precedent exists for the application of a standard of heightened scrutiny to settlement class actions. Thus, in *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971), the Third Circuit applied a standard of heightened scrutiny to a nationwide antitrust class action settlement negotiated by plaintiff's counsel prior to his designation as class counsel:

> . . . when the settlement is not negotiated by a court designated class representative, the court must be doubly careful in evaluating the fairness of the settlement to plaintiff's class.

Id. at 33. *See also In re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) (a district court is to make assessment required for class certification after "a rigorous analysis of particular facts of case"); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992) (when settlement of class action is reached prior to class certification, court must apply higher level of scrutiny in evaluating fairness of settlement, *citing Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987);

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12 Even in the unusual circumstances of this case where relatively extensive discovery was conducted by objectors, the district court, nevertheless, did not allow depositions of class counsel as to the course of the negotiations. Thus discovery on the issues of trade-offs made as between presently ill and future claimants and collusion between defendants and class counsel, which go to the very heart of the adequacy of representation, was not permitted. *See* Koniak, *Feasting*, *supra* note 11, at 1097-98 and n.242 at 1098.

Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982) (requiring "clearer showing of a settlement's fairness, reasonableness and adequacy and the propriety of the negotiations leading to [the settlement]" in cases where class settlement is filed before class has been certified and thus before class counsel and named class representatives have been found adequate to represent class); MANUAL FOR COMPLEX LITIGATION, § 30.45 (approval under Rule 23(e) of settlements involving settlement classes requires closer judicial scrutiny than approval of settlements where class certification has been litigated.)[13]

The amici States request the Court to make clear that heightened scrutiny must precede certification of the class in settlement class actions to ensure that class members' due process rights are not compromised for the sake of economy or efficiency.

II

GEORGINE-LIKE SETTLEMENT CLASS ACTIONS RAISE SERIOUS CONCERNS ABOUT THE ADEQUACY OF NOTICE

Notice is a critical constitutional protection, particularly in settlement class actions where the terms of settlements governing the extent of class members' ultimate recoveries are determined before class members even learn of such lawsuits. Indeed, class members' ability to participate in the case, decide whether to retain counsel, object to the certification of the class or the fairness of the settlement, or opt out of the lawsuit cannot be ensured unless meaningful notice is provided. Notice concerns are even greater when the settlement affects future claimants.

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[13] Even the district court in *Georgine*, in citing *Ace Heating*, *supra*, gave lip service to the need for heightened scrutiny in settlement class actions. However, its analysis fell far short of that standard.

In determining that due process requires notice to interested parties, this Court opined in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Thereafter, in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974), this Court held that individual notice to identifiable class members is an unambiguous requirement of Rule 23 of the Federal Rules of Civil Procedure, which incorporates due process standards[14], and that the individual notice requirement may not be waived in a particular case. Subsequently, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1984), the Court applied the notice requirement of *Mullane* to absent class members lacking the minimum contacts with the forum which would support personal jurisdiction over a defendant.[15]

The protections set forth in *Mullane*, *Eisen*, and *Shutts* are necessary to overcome the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *accord*, *Richards v. Jefferson County, Ala.*, 116 S.Ct. 1761, 1765-66 (1996); *see also McKinney v. Alabama*, 424 U.S. 669 (1976).

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[14] *Eisen* makes clear that any rule change, including the United States Judicial Conference's proposed Rule 23(b)(4), would have to satisfy minimum due process standards.

[15] The Court in *Shutts* thus held that minimal due process protections which must be afforded to such absent class members include giving the best practicable notice, "reasonably calculated . . . to apprise", plus an opportunity to be heard and participate in the litigation. *Shutts*, 472 U.S. at 812 (*quoting Mullane*, 339 U.S. at 314-15).

A. Georgine-like settlement class actions raise special concerns as to whether notice will reach a significant percentage of the class members

Toxic exposure class actions like the *Georgine* case and medical mass tort class actions (*e.g.*, silicone breast implant, Dalkon Shield, DES) present special difficulties in notifying class members.[16] Because of the vast number and types of claims, industries, occupations[17], and products[18] involved, and the fact that many individuals (particularly those exposed indirectly through direct exposure of a spouse or other family member) may not even be aware of having been exposed or otherwise medically harmed, the court faces great difficulties in identifying those individuals who should receive individual notice of the action.[19] Where, as here, the majority of the class—the future claimants—may never even hear of the settlement class action and will never have an opportunity

[16] For this reason and the lack of commonality of the issues presented, the use of the class action device in such cases has been criticized. *See, e.g., Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734, 745-747 (5th Cir. 1996); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1084-86 (6th Cir. 1996); Coffee, *Class Wars*, *supra* note 6, at 1343, 1358; Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1174-76 (1995).

[17] *See* Jt. App. at 236-7.

[18] *Id.* at 235-6.

[19] In *Georgine*, individual notice was sent only to the slightly more than 9,000 plaintiffs who had filed suit against one or more of the CCR defendants since the class action was filed. The class, however, has been alleged to include 250,000 to 2,000,000 members. Despite the difficulty of notifying class members in cases like *Georgine*, it nevertheless strains credulity that no class members other than the 9,000 plus who had filed their own lawsuits were identified to receive individual notice. Clearly, the twenty companies comprising the CCR could have identified many more individuals who were occupationally exposed to asbestos by working with their products. Thus, the notice in *Georgine* failed to satisfy the due process requirement enunciated in *Eisen* that individual notice be provided to identifiable class members.

to opt out of the class or to object to the settlement, the due process concerns are even more compelling.[20]

The Court of Appeals for the Third Circuit in *Georgine* expressed "serious concerns as to the constitutional adequacy of class notice" in this case, finding that "[p]roblems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be insurmountable." *Georgine v. Amchem Prods., Inc.*, 83 F.2d at 623, 633. The court concluded that, if the class action were approved, "it is obvious that . . . some plaintiffs would be bound despite a complete lack of knowledge of the existence or terms of the class action." *Id.* at 634.

[20] For example, movants Peggy and Charles Palmer, along with approximately 400 other class members, sought to opt out of the *Georgine* settlement on grounds of "excusable neglect" after the opt-out deadline had expired. The Palmers argued that good cause existed because they did not receive notice of the class action until three weeks after the deadline to opt out had passed. The district court denied their motion, based on its finding that failure to receive actual notice of the *Georgine* class action before the close of the opt-out period is not sufficient reason for extending the opt-out period. *Georgine v. Amchem Prods., Inc.*, 1995 WL 251402, at *16 n.35 (E.D.Pa. Apr. 26, 1995). The court likewise rejected the arguments of the 227 putative class members who contended that they should be given additional time to exclude themselves from the class because their local unions (that were to disseminate the notice under the notice plan) were unable to complete their mailings until after the close of the eight week notification period, leaving less than two weeks within which the recipients had to review, comprehend, decide and respond to the notice. The court stated that these movants had not demonstrated why the unions did not disseminate the notice at an earlier date (as if that information would be within movants' knowledge), and that other unions had been able to timely disseminate their notices. In rejecting all of the movants' requests to opt out, the district court also found that the movants were not prejudiced because the court had already ruled that the settlement was fair! *Id.* at 12. Yet, where the majority of class members never receive notice of the class action and might each wish to opt out of the class if they had learned of it, can due process truly have been provided to the class? Due process does not permit the court's rulings on the fairness of a settlement to substitute for adequate notice or other procedural protections. *See* Koniak, *Feasting*, *supra* note 11, at 1122-23.

Moreover, even if all class members, including the futures, had received individualized notice (and it is undisputed that they did not, *see, e.g., Georgine v. Amchem Prods., Inc.* 157 F.R.D. 246, 312 (E.D. Pa. 1994)), they still would not have been capable of making an intelligent choice as to whether to opt out, retain counsel or object. Futures class members, even if they are aware of their past asbestos exposure (and many are not) "may pay little attention to class action announcements." *Georgine v. Amchem Prods., Inc.*, 83 F.3d at 633. Without physical symptoms of past exposure, "people are unlikely to be on notice that they can give up causes of action that have not yet accrued." *Id.* As the State of Alabama explained in the district court, "the class members lack any basis for making an informed decision on whether to remain in the litigation. At best, class members could only guess whether the proposed settlement would be beneficial or detrimental to their interests." Br. Amicus Curiae at 4 (filed Apr. 29, 1993). The State of Texas added in the Third Circuit that "[m]any must have treated even individual written notices—if they received any—as junk mail." Br. Amicus Curiae at 3 (filed Feb. 27, 1995).

The Third Circuit thus found that even if class members learn about the class action and realize that they fall within the class, "they may lack adequate information to properly evaluate whether to opt out of the settlement."[21] *Georgine v.*

[21] Given the long latency period and the fact that not everyone exposed to asbestos will suffer health impairments, class members have no way to assess a number of critical issues: (a) when, if ever, they might become ill or even die from asbestos exposure; (b) whether the settlement described in the notice would even be in place if and when they might need it (because any CCR defendant may exit the settlement agreement after ten years); (c) what the settlement might mean to them if it were still in place, inasmuch as the settlement provides for a wide range of compensable and noncompensable categories into which they may fall, as well as caps on the defendants' exposure; (d) what the settlement's dollar figures might mean in view of the failure to adjust for inflation; and (e) what the world outside the settlement might look like in terms of common law and statutory remedies for asbestos-related illness in the distant future.

Amchem Prods., Inc., 83 F.3d at 633. Similarly, in *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996), a products liability class action against the manufacturers of an epilepsy drug, the court expressed serious due process concerns as to whether adequate notice could be given to all class members to enable them to make an intelligent choice as to whether to opt out. The Ninth Circuit found the notice deficient because the number of known users who reportedly had suffered actual injury from the drug was relatively small in comparison with all the users of the drug. Thus, many potential members of the class could not, at the time notice was given, know whether they were part of the class, and consequently could not make an intelligent choice about whether to opt out. *Id.* at 1234.[22] *See* 7B, CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D, § 1786 at 197-98 (2d ed. 1986).

The prospect of the wholesale termination of tort claims before they accrue, and before their holders are even aware of them or able to exercise an intelligent choice regarding them, is at odds with basic norms of fundamental fairness. Thus, in *Urie v. Thompson*, 337 U.S. 163 (1949), this Court held that an individual who had contracted silicosis "can be held to be injured only when the accumulated effects of the deleterious substance manifest themselves." *Id.* at 170. This Court

[22] Class member Martha Parker demonstrates the problem of requiring futures class members who are not presently suffering to decide whether to opt out of class settlements at the time notice is given. As reported by Barry Meier in *Lawsuits to End All Lawsuits*, N.Y. TIMES, January 10, 1996, at D5:

> Mrs. Parker said it came as a shock to her when she was diagnosed in 1994 with mesothelioma. She never worked around asbestos, but she figures she was exposed to it as an infant during World War II, when her father and grandfather worked in shipyards where asbestos was used as insulation. . . .
>
> Never suspecting she was a candidate for the disease, Mrs. Parker said, she paid no attention to local television ads instructing mesothelioma sufferers who wanted no part of the Philadelphia asbestos settlement to opt out of it.

rejected the alternative rule requiring a plaintiff to act on his claim before it accrued:

> It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, [the plaintiff] was charged with knowledge of the slow and tragic disintegration of his lungs; under this view [his] failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

Id. at 169. This Court concluded that compelling such an uninformed and unknowing waiver of claims by potential plaintiffs would mean that they had been afforded "only a delusive remedy."[23] *Id.*

B. Due process requires that notices contain, in comprehensible form, the information needed to make an informed decision as to whether to opt out, retain counsel or raise objections

"[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. Incomprehensible notices which fail to include significant disclosures cannot truly apprise class members of both the merits and the disadvantages of a class action settlement. Such notices do not satisfy the constitutional requirements of

[23] *See also Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) ("Except in topsy-turvy land you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom', that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff.")

adequacy and should never be approved. *See Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 395 (3d Cir. 1981) (description of proposed settlement in class notice must be amenable to "lay comprehension".)

Nevertheless, such constitutionally deficient class action notices are regularly approved by the courts. Because of the common use of technical language, it appears that "most notices are not comprehensible to the lay reader." Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 134 (1996) (Final Report to the Advisory Committee on Civil Rules) (Federal Judicial Center 1996).[24]

The notice in the case at bar, particularly those sections addressing the amounts class members may expect to recover under the settlement, is like so many class action notices, practically incomprehensible to the lay reader.[25] To ensure that the content of the class action notice is reasonably calculated to achieve the constitutional purposes of the notice, it should be written in language that a lay person of reasonable but unexceptional intelligence can be expected to understand, with all necessary disclosures set out clearly and conspicuously.

For notice to be meaningful and thus satisfy the constitutional requirement of adequacy, the notice must contain sufficient disclosure of the costs and benefits of participation in

[24] *See also* Arthur R. Miller, *Problems of Giving Notice in Class Actions, in Class Actions*, 58 F.R.D. 313, 321 ("The sad truth is that notices issued by courts or attorneys are much too larded with legal jargon to be understood by the average citizen."); Susan Adams, *Deliberate Obfuscation*, FORBES, September 9, 1996, at 152-54; Eddie Curran, *Settlement Irks Policyholders*, MOBILE PRESS REGISTER, December 16, 1996 (Class counsel in *Adams v. Robertson*, 676 So. 2d 1265 (Ala. 1995), acknowledged in court that notice to class members was full of legalese in tiny print, that it would take three to five hours to read notice himself, and that many policyholders would not be able to understand notice.)

[25] *See* Jt. App. at 258, 259.

the class action to allow class members to make an informed decision as to whether to opt out. When the notice concerns a proposed economic settlement of a mass tort class action, the following disclosures should be required: (a) a good faith estimate of the aggregate sum of any monies to be paid to class members and others by the defendants, how these monies would be divided among class members, and the impact of payment caps and case flow maximums[26] upon the class members' likelihood of receiving compensation under the settlement; (b) in class settlements covering future claimants, the notice should disclose whether the settlement will be adjusted for inflation; (c) disclosure of the rights that class members would lose or waive under the settlement (*e.g.*, generalized statistics as to amounts class members might expect to recover in their respective jurisdictions for their alleged injuries if they opted out of the settlement and sued in the tort system), and obligations imposed upon them by virtue of the settlement; (d) disclosure of the amount and method of calculation of all attorney's fees[27]; and (e) disclosure of class

[26] Nowhere in the Notice in the case at bar are class members apprised that the the total number of claims that may have compensation determined in the court system or through binding arbitration is severely restricted. The fact that only .5% - 2% of the total claimants per medical category may use these procedures to have their compensation determined in a given year, is not disclosed until page 10 of the Appendix to the Notice.

[27] *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996) (notice sent to over 600,0[illegible] truck owners was deficient in that it did not set forth maximum amount of attorney's fees sought by class counsel and specify method of calculating those fees); *cf.* Reduction of Abusive Litigation Act, 15 U.S.C. § 77z-1(a)(7) (in private securities litigation, requiring notice to class members of settlement terms, including amount of aggregate and individual proposed recovery, information on potential outcome of case, and amount and explanation of attorney's fees); S.1501, 104th Cong., 1st Sess. (Protecting Class Action Plaintiffs Act of 1995) (requiring similar disclosures in class action notices). As the court reasoned in *Bloyed*, notice of the attorney's fees is essential because without such notice, class members cannot gauge the possible influence of the fees on the settlement when they consider whether to object to it. 916 S.W.2d at 958.

counsel's simultaneous representation of similar non-class claimants, settlements which class counsel have achieved for those non-class claimants, and the timing of such settlements in relation to the filing of the settlement class action. The settlement in the case at bar fails to include these disclosures to any significant degree.[28] Thus, to ensure that class members can decide whether to present objections or to opt out of a mass tort class settlement based upon informed judgment, courts should require that class notices disclose the disadvantages as well as the benefits of participating in the class action, including disclosure of class counsel's related non-class representations and activities.

[28] For example, the Notice in the case at bar included no concrete information on (a) the settlements negotiated by class counsel for their non-class clients; (b) the potential disadvantages of the settlement, such as the fact that the case flow provisions might result in significant delays before recovery is received for those electing individualized treatment under the settlement, that the settlement does not ensure any adjustment for inflation for future claimants, or that the settlement extinguishes certain claims recognized in some states, such as claims for loss of consortium and medical monitoring; and (c) the size of class counsel's attorney's fee or the amount class counsel received in fees for negotiating inventory settlements of non-class clients' claims that were contingent on the filing of this class action settlement. An ordinary client would be entitled to all such disclosures from his or her lawyer before being asked to decide whether to accept a settlement. The court (acting as the class' guardian) and class counsel should be required to provide at least as much information to absent class members, who are more vulnerable to attorney self-dealing and less capable of monitoring their attorneys' conduct. *See* Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1 (1995).

III

GEORGINE-LIKE SETTLEMENT CLASS ACTIONS RAISE CONCERNS ABOUT THE ADEQUACY OF REPRESENTATION AFFORDED TO CLASS MEMBERS

As this Court stated in *Phillips Petroleum Co. v. Shutts*, *supra*, the Due Process Clause "of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." 472 U.S. at 812 (*citing Hansberry v. Lee*, 311 U.S. at 42-43, 45). The constitutional requirement of adequacy applies equally to class counsel. *See In re General Motors* , 55 F.3d at 801.[29] The Court reaffirmed this requirement last term in *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761 (1996). *See also Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 890 (1996) (wherein Justice Ginsburg, in her concurring opinion emphasized the "centrality of the procedural due process protection of adequate representation in class action lawsuits"). If the requirement of adequate representation is to be met, the class representative and class counsel must be free of conflicts that threaten to compromise the interests of class members. *See Matsushita*, 116 S. Ct. at 888 n.5 (Ginsburg, J., concurring) (*citing General Tel. Co. v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982)).[30] Settlement class actions, in particular, create "unparalleled opportunity for collusion between defendants and class counsel, as both stand to gain from negotiating a deal providing generous fees for counsel and meager recovery for the class." *In re Asbestos Litig.*, 90 F.3d at 1000 (Smith, J., dissenting) (*citing In re General Motors*, 55 F.3d at 788).[31]

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29 *See also North American Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4 (5th Cir. 1979); *In re Fine Paper Antitrust Litig.*, 617 F.2d 22,27 (3d Cir. 1980).

30 *See also Prezant v. De Angelis*, 636 A.2d 915, 925 (Del. 1994) (*cited in Matsushita*, 116 S. Ct at 889).

31 *See supra* at note 7; *see also* (with respect to conflict of interest) John C. Coffee, Jr., *Rethinking the Class Action*, 62 IND.L.J. 625,

These concerns are heightened when, as in the case at bar, class counsel simultaneously settle their "inventory" of similar claims outside of the class[32], on better terms than those negotiated for the class. *In re Asbestos Litig.*, 90 F.3d at 993-95 (Smith, J., dissenting); Coffee, *Corruption of the Class Action*, *supra* note 8, at 852; Koniak, *Feasting*, *supra* note 11, at 1051-55.

A. Where Fundamental Conflicts Exist Between Class Members, the Same Counsel Cannot Adequately Represent the Entire Class.

The Third Circuit, after examining the class action settlement in the case at bar and finding that it allocates relief among different types of class members whose interests are at odds, concluded that serious intra-class conflicts exist between the presently injured and futures plaintiffs.[33] Those conflicts, the Third Circuit held, precluded the class from meeting the adequacy of representation requirement. *Georgine v. Amchem Prods., Inc.*, 83 F.3d at 630. The Third Circuit correctly found, moreover, that absent structural protections to ensure that differently situated plaintiffs negotiate for their own unique interests, the fact that plaintiffs of different types were among the named plaintiffs did not rectify the conflict. *Id.* at 631.

Upon comparing the treatment of presently ill class members and futures (exposure-only) class members, the inade-

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628-29 (1987); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. LEGAL STUD. 47, 61 (1975); Macey & Miller, *supra* p. 6, at 7-8.

32 Attorneys in the mass tort field commonly accumulate a large inventory of clients with similar claims and deal with these cases, not on an individual basis, but rather by settling them on an inventory-wide basis with a particular defendant. Coffee *Class Wars*, *supra* note 6, at 1364-65.

33 Petitioners argue that the Third Circuit completely ignored the settlement agreement and framed the issue before this Court to say that. The opinion of the court below belies that claim. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d at 630-31.

quacy of the representation provided to all members of the purported class is clear. That the interests of futures class members were compromised is aptly demonstrated by the following aspects of the settlement:

> (a) Exposure-only class members receive no compensation. (Jt. App. at 52).
>
> (b) There is no adjustment for inflation. (*Id.* at 77).
>
> (c) The number of future claimants who may opt out when they finally show asbestos-related symptoms is limited to only a few persons per year. (*Id.* at 87-88).
>
> (d) The causation provisions do not account for changes in science that could benefit the ability of the futures plaintiffs to establish their claims at such time as they may develop illnesses in the future. (*Id.* at 52, 56-65).

Presently ill claimants should not be favored over future claimants in class settlements simply because they became ill first.

The inherent intra-class conflicts in mass tort class actions such as the one at bar demand that the courts prohibit class counsel from representing both the futures and presently ill class members. One solution is to divide the class into formal subclasses, each represented by independent counsel. *See* Fed.R.Civ.Pro. 23(c)(4); *In re Joint E. & S. Dists. Asbestos Litig.*, 982 F.2d 721,739 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); *In re "Agent Orange" Prod. Liab. Litig.*, 869 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994) (suggesting requirement of separate representation for subclass of future claimants not presently suffering).[34] While the use of subclasses and separate representation for those subclasses would impose greater costs and involve greater difficulties in reaching settlements (*See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 55 (1995), the advantages warrant this Court requiring

[34] *See also* Koniak, *Feasting*, *supra* note 11, at 1086-95.

such separate representation. The desire to achieve efficiency and economy must not override due process considerations. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980) (upholding remand to district court to consider possibility of certifying subclasses as not imposing undue burdens on district courts.)

B. The Dynamics Between Defendants and Class Counsel in Georgine-like Settlement Class Actions May Result in Settlements of Reduced Benefit to the Class, Raising Concerns about the Adequacy of the Representation Afforded to the Class

Settlement class actions like the *Georgine* case—where trial of the action is concedely impossible and where the action is commenced only after and because opposing parties have finalized a deal resolving the claims of largely unknowing class members—change the dynamic between defendants and class counsel. No longer able to hold out the risk to defendants of being forced to litigate and face the best plaintiffs' lawyers at trial as in the typical class action, class counsel's negotiating position is substantially weakened. Likewise, defendants' calculus in entering into a settlement is fundamentally changed. Defendants' selection of counsel with whom to negotiate and design a class action settlement to resolve vast numbers of claims may result in what has been referred to as a "reverse auction" phenomenon.[35] As observed

[35] The most ethically disturbing problem with the mass tort class action may be its tendency toward "structural collusion." . . . At its worst, this process can develop into a reverse auction with the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant.

Coffee, *Class Wars*, *supra* note 6, at 1354.

In a reverse auction, "[t]he first team of plaintiffs to settle with the defendants in effect precludes negotiations with the others (who may have originated the action and litigated it with sufficient skill and zeal that the defendants were eager to settle with someone else)." *Id.* at 1370. That is exactly what happened in the case at bar. The district court found "no suggestion in the . . . discovery and litigated record that CCR exec-

by Judge Smith in his dissenting opinion in *In re Asbestos Litig.*, 90 F.3d at 1000, "a defendant may pick his opposing counsel and then negotiate with absolutely nothing to lose from walking away from the deal; class counsel, on the other hand, work *pro bono* unless they consent to a settlement."

These concerns are further heightened and complicated by class counsel's parallel representation of inventories of non-class clients, whose claims are settled as part of the overall agreement between defendants and class counsel, but on terms more beneficial than those negotiated for the class. The *Georgine* case presents just such a scenario; class counsel's 14,000 non-class clients participated in an inventory settlement of more than $200 million (for which class counsel received $70 million in attorney's fees), that was concluded simultaneously and in conjunction with the filing of the class action complaint, answer, and stipulation of settlement. The benefits class counsel achieved for their non-class clients in those inventory settlements were clearly more advantageous than the terms class counsel negotiated for the class.[36]

utives or attorneys met and decided to 'choose' plaintiffs' counsel with the largest inventory of unsettled claims in order to facilitate a global settlement by creating an atmosphere of collusion") (*Georgine v. Amchem Prods., Inc.*, 83 F.3d at 294). Nevertheless, the court acknowledged that after it became clear that settlement negotiations between the CCR defendants and class counsel in the MDL proceeding would not produce a global agreement, the CCR defendants approached class counsel, who were representing thousands of asbestos victims nationwide, to pursue individual global settlement negotiations.

[36] For example, pleural claims, which involve asbestos-related plaques on the lungs but no physical impairment, received no cash compensation under the class settlement even though such claims regularly receive substantial monetary payments in the tort system. Non-class clients with such claims received cash compensation. Second, class claimants suffering from mesothelioma (whose only known cause is asbestos exposure) were limited to relatively modest recoveries under the class settlement ($20,000 - $200,000, with a negotiated average value range of $37,000 - $60,000 (*See* Jt. App. at 110)), even though mesothelioma plaintiffs in the tort system generally recover amounts running into the millions of dollars (*See Georgine v. Amchem Prods.*,

The amici States are concerned that the district court did not take appropriate heed of the change in dynamics between defendants and class counsel, or class counsel's divided interests in negotiating settlements for both class and non-class clients as part of an overall settlement package. Under these circumstances, where there were no other safeguards designed to remedy the inherent conflicts in the representation afforded by class counsel, the due process requirement of adequate representation was not satisfied. *See In re Asbestos Litig.*, 90 F.3d at 994, 1009-11 (Smith, J. dissenting).

To the extent settlement class actions are to be used to resolve complex mass tort litigation as in *Georgine*, this Court should announce objective standards with reference to which the district courts must test the adequacy of the representation afforded to class members. The Court should require the district courts to consider the following factors as indicia that the requirement of adequate representation is not met: (a) parallel representation by class counsel of both the class and of similarly situated non-class claimants,[37] (b) settlement agreements negotiated by class counsel for their non-class clients in conjunction with the negotiation of a class settlement, (c) more favorable settlement negotiated for the non-class claimants than those negotiated for the class; and (d) that the class is defined to include only those claimants who have not filed lawsuits against the defendants by a given date. This Court should also require that district courts not merely accept the competency and experience of counsel as sufficient

Inc., 83 F.3d at 630). Non-class clients' recoveries for mesothelioma were not so limited. Additionally, class members with lung cancer were required to produce evidence of causation, while non-class clients with lung cancer did not. Finally, compensation for the class was limited by negotiated average value ranges which did not apply to the non-class clients.

[37] *See also In re Asbestos Litig.*, 90 F.3d at 1010-11 (Smith, J., dissenting) (advocating that parallel representation of class members and individuals with similar claims in separate actions against defendant be prohibited as entirely inconsistent with adequate representation).

indicators of adequacy as the district court did in the case at bar.[38]

Additionally, class counsel should be required to provide the court with sufficient information on the costs as well as the benefits of any recommended settlement so as to allow the reviewing court to make an informed evaluation of the fairness of the settlement.[39] Class counsel should be required to disclose to the Court and in the notice to the class, information on settlements previously achieved by class counsel for similarly situated non-class clients and information regarding the payment of attorney's fees in the non-class clients' settlements and in the class settlement. *See supra* p. 18. A further standard would be a requirement that when ruling on the adequacy of representation, courts must find that class counsel do not simultaneously represent claimants with competing interests and that in any mass tort class action covering such claimants, subclasses are separately represented by counsel. *See supra* pp. 22-23.

Finally, the Court should require the district courts to consider the appointment of an advocate for the class, at least in those situations with the greatest potential for harm to the interests of class members (*e.g.* in settlement class actions involving future claimants), and either appoint such an advocate or find that such appointment is not required to ensure the adequacy of the class' representation. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 310 (court appointed special guardian and attorney for class members); *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d at 1437 (court ordinarily would anticipate appointment of guardian to represent interests of absent class members in cases involving future claimants where notice is not likely to be effective).

[38] *See* Br. for Petitioners at 4.

[39] *See* Manual for Complex Litigation § 30.43 (counsel must disclose to court any facet of proposed class action settlement that may adversely affect any member of class or result in unequal treatment of members of class).

IV

DUE PROCESS AND RULE 23(b)(3) REQUIRE THAT FUTURES CLASS MEMBERS SHOULD BE AFFORDED DELAYED OR BACK-END OPT-OUT RIGHTS

Under the settlement in the case at bar, only a very few futures class members are entitled to delayed or "back-end" opt-out rights, *i.e.*, the right to opt out of the settlement upon discovery of injury resulting from exposure to or use of the defendant's harmful product. Because mass toxic torts typically have long latency periods, decades may pass between the time the class is certified and the settlement approved, and when a futures class member discovers that he or she is ill. A delayed or back-end opt-out right for future claimants is essential to allow such claimants to make the decision whether to opt out of the class at a point in time that is meaningful—if and when they actually develop asbestos-related illnesses. Otherwise, as occurred under the settlement certified by the district court in *Georgine*, the futures class members must decide whether to opt out before they ever become sick and can properly assess what the settlement's terms mean to them. Coffee, *Corruption of the Class*, *supra* note 8, at 856 n.11.

Precedent exists for affording class members the option of a delayed opt-out to ensure the meaningful implementation of opt out rights. *See In re A.H. Robins Co.*, 880 F.2d 709, 745 (4th Cir.), *cert. denied*, 473 U.S. 959 (1989) (stating that any class member who was dissatisfied with the settlement offer had, under the settlement, "the right to elect to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial.");[40] *see also Bowling v. Pfizer, Inc.*,

[40] Although the election in *Robins* was not labeled as an opt-out right as such, in effect it amounted to a delayed opt-out right.

143 F.R.D. 141 (S.D. Ohio 1992); *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994) (the Federal Rules, *e.g.*, Fed. R. Civ. P. 6(b)(2), 23, and 60(b)(6), permit a district court to extend an opt-out period). Particularly in the case at bar, where the majority of the class are future claimants who are denied any delayed opt-out rights, while each of the CCR defendants may decide to back out of the settlement at the end of a ten year period, fundamental fairness demands that futures class members be afforded back-end opt-out rights.

This Court should clarify that such a back-end opt-out right must be afforded to futures class members as an essential requirement of constitutional due process. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-813 (1985), this Court held that absent class members have a constitutional due process right to opt out of class actions brought in state court where plaintiffs' claims are wholly or predominately for money judgments. Thereafter, in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted*, 510 U.S. 810 (1993), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994), the Ninth Circuit extended the constitutional due process right to opt out to absent plaintiffs with claims for monetary damages in federal multidistrict class litigation.

The extension of *Shutts*' due process requirement of opt-out to federal multidistrict class litigation involving claims for monetary damages and, further, the application of that right to a back-end opt-out right for futures class members is consistent with the notion of due process as a "flexible concept" designed to ensure "fundamental fairness." *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *citing Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985). In ruling that this due process standard of "fundamental fairness" was met by the delayed trial-election right afforded certain class members, the Fourth Circuit focused not on "semantics", *i.e.*, " not . . . whether the talismanic word 'opt-out' is used but whether the right given exists in effect." *In re A.H. Robins*, 880 F. 2d at 745, *citing Walters v. National Ass'n of Radiation Survivors*, 473 U.S. at 321. *Georgine* presents the flip-side of the class settlement in *In re A. H. Robbins*. Although the language of the settlement specifically grants the futures class an opt-out right, this right does not exist in reality for the future claimants who comprise the majority of the class.[41] Under the settlement, the futures class members are required to exercise the opt-out right at a point in time when they lack the wherewithal to make an informed judgment as to the impact of the settlement on their particular situation. Without an opportunity to exercise the right at a meaningful point in time, its mere inclusion in the settlement does not satisfy the requirements of due process.

The same result obtains under a Rule 23(b)(3) analysis. In Rule 23(b)(3) class actions (the provision under which the class in *Georgine* was certified), Rule 23(c)(2) requires that class members be afforded a right to opt out of the class. However, this right cannot meaningfully be afforded to future claimants unless such claimants are permitted to exercise that right at a relevant time, *i.e.*, if and when they become ill. A delayed or back-end opt-out right for futures class members is thus necessarily required under Rule 23 if the opt-out requirement for (b)(3) classes is to be meaningfully implemented with respect to futures claimants.

In sum, the failure of the *Georgine* settlement to provide back-end opt-out rights to almost all of the future claimants in the class renders the settlement unconstitutional. Additionally, certification of the class under Rule 23(b)(3) was also improper because (c)(2)'s opt-out requirements for (b)(3) class actions were not meaningfully implemented with respect to futures class members.

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41 *See* George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 279 (1996) (arguing for delayed opt-out for futures and asserting that right to opt out "should not be effectively denied by inadequate notice.")

CONCLUSION

WHEREFORE, for all the foregoing reasons, the amici States respectfully request that the decision of the Court of Appeals for the Third Circuit be upheld. The amici States request further that the Court articulate guidelines for lower courts to follow when dealing with settlement class actions which cannot meet the class certification requirements of Fed.R.Civ.P. 23, to ensure that the due process requirements of adequate notice, adequate representation and the right to opt out of the class at a meaningful point in time are afforded to all class members. In requiring such heightened scrutiny of these settlement class actions, the Court should impose objective standards as suggested by the amici States against which the district courts must measure the constitutional sufficiency of class action notices, the representation afforded to class members, and opt-out rights.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
State of California

THOMAS F. GEDE
Special Assistant Attorney General

ALBERT NORMAN SHELDEN
Supervising Deputy Attorney General
110 West A Street, #1100
P.O. Box 85266
San Diego, CA 92186-5266
(619) 645-2062

DENNIS C. VACCO
Attorney General
State of New York

BARBARA GOTT BILLET
Solicitor General

SHIRLEY F. SARNA
NANCY SPIEGEL
JOY FEIGENBAUM*
JANE M. KIMMEL
Assistant Attorneys General
120 Broadway
New York, New York 10271
(212) 416-8844

**Counsel of Record*
(Additional counsel listed on inside cover)